March 15, 2018

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Communication
Wireless Infrastructure Streamlining Report and Order, WT Docket No. 17-79

Dear Ms. Dortch,

Encouraging the deployment of broadband services is among the top priorities assigned to the Commission by Congress in the 1996 Telecommunications Act.[1] For too long, the Commission has been distracted from this priority by spending its limited time and resources on regulatory efforts of questionable value — most notably, the FCC's repeated efforts over the last decade to invent authority to regulate Internet services despite clear Congressional instruction that the Internet remain "unfettered by state and federal regulation."[2] Thus, we commend the Commission for working through the various complex issues that affect broadband deployment, especially the unprecedented deployment of small cells that will be necessary to provide 5G service.

Capable of delivering gigabit speeds, 5G service will enable the next great wave of innovation in high-bandwidth mobile applications, such as ultra-high-quality real-time video streaming in its many potential form. As Commissioner Carr notes, addressing those barriers "could mean the difference between those cutting-edge, 5G-enabled devices launching here in the

[1] 47 U.S.C. § 1302(a).
[2] 47 U.S.C. § 230(b)(2).

United States or watching consumers in other countries benefit from them first."[3] 5G wireless will also allow wireless providers to compete toe-to-toe with wireline broadband companies in the provision of broadband to homes and businesses (at least in areas with sufficient density to justify the cost of deployment). American leadership in 5G deployment is of such importance that it has even been cited as a vital national security concern by the recent CFIUS review of the proposed acquisition of Qualcomm, the leading manufacturer of 5G components, by the Singapore-based Broadcom.[4]

Subjecting the installation of all 5G small cell infrastructure to review under the National Environmental Preservation Act (NEPA) and National Historic Preservation Act (NHPA) would significantly hinder 5G deployment. The Commission has long recognized that not all wireless equipment installation merits review NEPA or NHPA review because the delay to deployment of beneficial services, and the associated lost economic growth, would far outweigh concerns about their environmental or historical impact. The Commission has, accordingly, already excluded signal boosters for commercial wireless services (which many customers and businesses use to extend 3G and 4G services inside buildings), Wi-Fi hotspots, and other unlicensed equipment.[5]

These small wireless devices simply would not have been so readily available to consumers if their deployment had required NEPA or NHPA review. Likewise, subjecting all 5G small cells to NEPA and NHPA review would greatly slow 5G deployment and jeopardize American leadership in the applications that 5G wireless will enable. As Commissioner Carr notes, "[t]he fees associated with these procedures have risen dramatically in recent years, spiking by as much as 2,500% in parts of the country and needlessly costing millions of dollars that could have been put toward infrastructure deployment."[6] Industry experts anticipate 5G net-

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[3] Brendan Carr, Commissioner, Fed. Commc'n Comm'n, Remarks at the Consumer Technology Association's 5G Day (Feb. 28, 2018), https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0228/DOC-349499A1.pdf.

[4] Letter from Aimen N. Mir, Deputy Asst Secretary, Investment Security, U.S. Dep't of the Treasury to Mark Plotkin, Covington & Burling LLP & Theodore Kassinger, O'Melveny & Myers LLP (March 5, 2018), https://www.sec.gov/Archives/edgar/data/804328/000110465918016576/a18-7296_12ex99d1.htm.

[5] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79, Draft Second Report and Order ¶¶ 40, 63 (March 1, 2018), https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0301/DOC-349528A1.pdf (*Wireless* Draft Second Order).

[6] Press Release, Summary of Commissioner Brendan Carr's Remarks on Ensuring the U.S. is 5G Ready, Fed. Commc'n Comm'n (March 1, 2018), https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0228/DOC-349501A1.pdf.

works to require "10 to 100 times more antenna locations than previous 3G and 4G networks" and that carriers are expected to deploy more small cell antennas in the next three and a half years than the entire number of macro cells in the last 35 years.[7]

This enormously magnifies the fees and review time associated with NEPA and NHPA review, and must weigh heavily in the cost-benefit analysis underlying the Commission's decision about what kinds of wireless service deployment merits NEPA or NHPA review. The courts have recognized the Commission's discretion in defining what constitutes an "undertaking" subject to NHPA and a "major Federal action" under NEPA according to the agency's assessment of the public interest.[8] That discretion includes not only unlicensed services but also services that are licensed for a general service area, but where the federal government is not licensing construction at specific location.

The FCC's current rule governing what is and is not subject to NEPA and NHPA review, 47 C.F.R. § 1.1312, has not been updated since 1991. Unsurprisingly, therefore, the rule does not reflect the FCC's sensible practice of not subjecting small devices to NEPA and NHPA review. Rather, Section 1312(e) excludes only mobile stations generally — which implicitly excludes fixed but small devices.

We agree that, with respect to NHPA (our principal concern in these comments), the "Commission may exclude activities from Section 106 review through rulemaking upon determining that they have no potential to cause effects to historic properties, assuming such properties are present"[9] (and the same for NEPA). The FCC should, as the proposed Order would do, amend Section 1312(e) to exclude (from NHPA and NEPA review) not only mobile stations but also a class of small wireless equipment. Codifying this revision to the FCC's rules is long overdue. 5G small cell antennas, which are generally smaller than a backpack, are inherently no different from Wi-Fi hotspots. Excluding them from a category of small wireless equipment not subject to NEPA and NHPA would be arbitrary and irrational.

While 5G antennas may be only marginally smaller than 4G antennas, the structures to which they attach differ significantly because of the essential differences in range between small cell and macrocell service — and it is the size of the corresponding structure that matters

[7] *Wireless* Draft Second Order 13, ¶ 37.
[8] *See CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105 (D.C. Cir. 2006).
[9] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry 24, ¶ 66 (April 21, 2017), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-38A1.pdf (*Wireless* NPRM).

most for NEPA and NHPA impact. While 4G antennas are generally attached to towers between 70 and 300 feet,[10] 5G antennas can and will be installed on a wide variety of existing structures, from buildings to street lamps to stoplights. The Commission would exclude, as small wireless equipment, small cells attached to structures of under 50 feet, or new or existing structures that are no more than 10 percent taller than other structures in the area, or "where the existing structure to which the small wireless facility is affixed is not extended in height by more than 10 percent as a result of the deployment."[11]

We believe this definition is amply justified *with respect to existing structures*. There is simply no reason why affixing a small antenna to an existing structure, with only minor modifications should implicate either NEPA or NHPA. No new ground will be disturbed and the visual impact will be minimal. As the order notes, states and localities will be free to enforce their own zoning and historic preservation laws to address any concerns about the attachment of a small cell. There is simply no need for the FCC to police such inherently state and local matters.

However, we do recognize that tribal entities have unique concerns: NHPA review protects their interest in a way that state and local entities simply will not, because, as Congress has recognized, tribes have legitimate interests in burial grounds and views from traditional religious sites. Again. we believe the Commission has the discretion to exclude small cells attached to *new* structures as well as those attached to *existing* structures from NHPA review, but we do not believe the analysis contained in the proposed Order is adequate to justify excluding new structures — or at least new structures on previously undisturbed ground — from NHPA review. Nor do we believe that the process by which the Commission developed that part of the proposed amendment is adequate to fulfill the FCC's special trust relationship with America's tribes.

On both counts, the Commission is almost very likely on safe legal ground, because the courts broadly defer to agencies' factual findings, and the courts have set a very low bar for providing notice of a proposal regulation, but that does not mean the Commission should not do more than the courts have required. We believe this is an opportunity for the Commission to demonstrate how evidence-based analysis should work, and why providing *specific* notice of proposed regulations for public comment is essential to informing meaningful cost-benefit analysis, especially when sensitive non-economic interests are at stake.

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[10] Letter from Henry Hultquist, Vice President, AT&T to Marlene Dortch, Secretary, Fed. Commc'n Comm'n at 7 (Feb. 23, 2018), https://ecfsapi.fcc.gov/file/1022359695070/2018-02-23%20-%20ATT%20Ex%20Parte%20-%20WT%2017-79.pdf.

[11] *Wireless* NPRM at 24, ¶ 70.

The Commission cites the example of Crown Castle, which "states that it has never received a report or a negative response from a Tribal Nation regarding a proposed small cell deployment."[12] Given that 5G deployment is in its early stages, it is hard to see what this example tells us. How many small cells has Crown Castle actually deployed? So, too, with the example of Sprint, which claims that "[s]ince the current tribal consultation system was enacted by the FCC in 2004, Sprint has not had a single substantive consultation with tribes over adverse impacts on Historic Properties despite thousands of tower and antenna project notifications to tribes using the FCC's Tower Construction Notification System and paying millions of dollars in 'consultation' fees."[13] The Commission then cites Verizon, which "represents that between 2012 and 2015, only 0.3% of Verizon's requests for Tribal review resulted in findings of an adverse effect to tribal historic properties," and AAR, which states that "more than 99.6 percent of deployments pose no risk to historic, tribal, and environmental interests."[14] The Commission does not address the 0.3% or 0.4% of cases where review *does* trigger a valid interest. It simply concludes: "Based on these apparently minimal effects of small wireless facility deployment on environmental and historic preservation interests, we believe that the benefits associated with requiring such review are de minimis both individually and in the aggregate."[15]

The FCC's conclusion (even with respect to new structures) may well be correct. But this is not how cost-benefit analysis should work. The Commission should, at a minimum, do more to "show its work." For example, what percentage of those cases involved small cells? Or, more importantly, given that the entire premise of this proceeding is that 5G small cell deployment is about to explode exponentially, what percentage of small cell deployments can reasonably be expected to trigger review? These are difficult questions to answer — and, indeed, can never be answered quantitative precision, but that does not mean the Commission has performed the right level of analysis.

The next example cited helps to illustrate our concern: it does illustrate why *some*, and probably most, small cells should be excluded from NHPA review — but not necessarily all. According to the FCC, Sprint claims it "deployed 23 small cells in Houston to upgrade its network in preparation for the crowds descending on Super Bowl LI. Even though the stadium construction itself did not involve any historical consultation with tribes under Section 106 of the NHPA (because the stadium construction was not a federal undertaking), carriers building an antenna in the parking lot were obligated by FCC rules to engage in the Section

[12] *Wireless* Draft Second Order at 26, ¶ 74.
[13] Comments of Sprint Corporation, WT Docket No. 17-79, at 16 (filed June 15, 2017), https://ecfsapi.fcc.gov/file/10615159927158/Sprint%20Infrastructure%20Comments-Final.pdf.
[14] *Wireless* Draft Second Order at 26, ¶ 74.
[15] *Id*.

106 process. And as with its other reviews since 2004, it did not lead to any substantive consultation with Tribes that revealed adverse impacts."[16] This example illustrates the absurdity of requiring NHPA review for existing structures — and maybe even for new structures on previously disturbed ground or situated around large existing structures (here, on top of a parking lot next to a massive sports stadium). That almost certainly makes it highly unlikely that there will be any marginal harm in terms of visual obstruction, but it does not actually precisely address concerns about the depth of excavation that might be required to install a 50 foot tower. A parking lot might be paved over an ancient burial ground without actually disturbing it in the way a tower would. Of course, the fact that the parking lot is right next to a stadium *may* mean that the ground has already been disturbed. It is hard to generalize from this example.

If anything, the example illustrates the possible permutations that the FCC's rule could have taken. The rule might, for example, have excluded all small cell deployments on all existing structures as well as new structures on previously disturbed ground, or near existing large structures — rather than excluding all new structures, regardless of location, categorically. We do not know what the right rule is; again, it may indeed be the exactly the one contained in the Proposed Order. But we do not believe the FCC can truly know either for one simple reason (beyond the limited analysis contained in this section of the proposed Order): the FCC did not put out its proposed rule for public comment.

Instead, the Notice of Proposed Rulemaking ("NPRM") issued last year merely sought "comment on whether we should revisit the Commission's interpretation of the scope of our responsibility to review the effects of wireless facility construction under the NHPA and NEPA."[17] That paragraph of the Proposed Order would have been perfectly appropriate in a Notice of Inquiry ("NOI") on this topic, but such general questions are not appropriate for NPRMs — which, we believe, should actually include *proposed* rules. Again, whether the Commission has satisfied the low bar set by the courts for providing notice is beside the point (a court would likely consider the amendment to Section 1.1312(e) contained in the Proposed Order the "logical outgrowth" of these questions). The real question is how the Commission *should* operate.

We have long believed that the Commission all too often uses NPRMs to do what is properly done through a NOI, and, further, if the Commission does ask such general questions in an NPRM, it should issue a Further NPRM to seek comment on that particular proposal before moving to a final order. We commend Chairman Pai (as we have done before), for taking the

[16] *Id.* at 26, ¶ 75.
[17] *Wireless* NPRM at 27, ¶ 76.

unprecedented step of putting proposed final orders out for public comment in the "white copy" issued a month before each Commission meeting,[18] but this cannot substitute for seeking public comment on proposed rules. If anything, our proposed practice is logically consistent with Pai's reform; we believe the two reforms would work hand-in-hand. We are not the only ones to propose such a reform. The Federal Communications Commission Process Reform Act of 2014, introduced by House Energy & Commerce Committee Chairman Greg Walden, would have required the FCC to "establish procedures for the inclusion of the *specific language of the proposed rule or the proposed amendment of an existing rule* in a notice of proposed rulemaking."[19] We believe this reform is long overdue, and there is no reason the Commission should wait for Congress to pass such legislation.

Had the Commission sought public comment on its proposals, it would either have received more detailed comments from tribes explaining their concerns or proposing possible alternative permutations of the rule to draw distinctions that better reflect their interests (*e.g.,* whether the new structure is on previously undisturbed ground) — or, in the absence of such comments, the Commission could reasonably have concluded that, by default, its proposal is the best way to serve the public interest because the interests on the other side of the ledger are truly "de minimis." We recognize that additional rounds of notice and comment have costs, and that those costs may not be worth it in every case. For that reason the Walden bill did not require the Commission to seek comment on *every* proposed; instead, it required the Commission to draw rules as to when public comment on a specific proposal would be required.

Here, we believe the FCC should have sought public notice on the proposed categorical exclusion from NHPA (but not necessarily NEPA), for essentially two reasons: First, and most importantly, the FCC's Policy Statement on Relationship with Indian Tribes, issued in 2000, recognizes that "[t]he federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes."[20] Specifically, the Commission that, "in accordance with the federal government's trust responsibility, and to the extent practicable, [the agency] will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and

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[18] Graham Owens, *Pai Brings Unprecedented Transparency to Open Internet Proceedings*, Tech Policy Corner (Nov. 22, 2017), https://techpolicycorner.org/pai-brings-unprecedented-transparency-to-open-internet-proceeding-8f3d70698178.

[19] H.R. 3675, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/3675/text.

[20] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080 (June 23, 2000), https://apps.fcc.gov/edocs_public/attachmatch/FCC-00-207A1.pdf.

resources."[21] For this reason, in the 2003 NPRM that preceded the 2004 NPA Order, the FCC specifically sought public comment on two tribal proposals developed after extensive consultation with the FCC..[22] Given that precedent, is an additional round of notice and comment on a proposal developed solely by the FCC really too much to ask to protect the interest of the sovereign tribes and satisfy the federal government's trust relationship with them? Even if the FCC arrives at essentially the same conclusion, we think the additional round of public comment would be worth it to satisfy this unique and heavy historic burden.

Second, there is a more general principle at stake here: this Commission has committed itself to instilling cost-benefit analysis into the Commission's work. If the Commission wants that analytical approach to stick, to be respected by future Chairman, regardless of party, it is essential that the Commission take the opportunity to demonstrate how cost-benefit analysis would work in practiced — and why it is neither an obstacle to progress (like clearing the way for 5G deployment), nor inherently hostile to non-monetary interests, such as historic preservation and the unique concerns of Indian tribes.

While the FCC, as an independent agency, is not legally required to perform cost-benefit analysis in the way that Executive Branch agencies are, it is worth considering Circular A-4, issued by the Office of Management and Budget in 2003:

> To evaluate properly the benefits and costs of regulations and their alternatives, you will need to do the following:
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> - Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks. *A similar analysis should be done for each of the alternatives.*
> - Identify a baseline. Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a "no action" baseline: what the world will be like if the proposed rule is not adopted. Comparisons to a "next best" alternative are also especially useful.
> - Identify the expected undesirable side-effects and ancillary benefits of the proposed regulatory action and the alternatives. These should be added to the direct benefits and costs as appropriate.
>
> With this information, you should be able to assess quantitatively the benefits and costs of the proposed rule and its alternatives. A complete regulatory analysis includes a discussion of non-quantified as well as quantified benefits and costs. A non-

[21] *Id*. at 4081.
[22] *In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, Report and Order at 13, ¶ 31 (Oct. 5, 2004), https://apps.fcc.gov/edocs_public/attachmatch/FCC-00-207A1.pdf.

quantified outcome is a benefit or cost that has not been quantified or monetized in the analysis. *When there are important non-monetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs*. When your analysis is complete, you should present a summary of the benefit and cost estimates for each alternative, including the qualitative and non-monetized factors affected by the rule, so that readers can evaluate them.[23]

The FCC certainly does not appear to have performed such analysis here. Indeed, it would have been impossible to do so without actually seeking public comment on a specific proposal. "Measure twice, cut once" should be the Commission's general rule.

Future Commissions, under different leadership, may cite this proceeding as an example of why they do not need to seek public comment on specific proposed regulations, or to perform real cost-benefit analysis — to justify proposals that this Commission, wireless providers and proponents of this Proposed Order would find appalling. Such objections will have more credibility if the Commission reconsiders its approach here. Specifically, we encourage the Commission to:

1. Issue the proposed categorical exclusion, *with respect to new structures*, in a Further NPRM, seeking comment on the trade-offs presented by this proposal as well as on alternatives to this proposal, such as might depend on the condition of ground, and conclude a second comment round on that proposal as expeditiously as possible, to avoid further delay of wireless deployment. The categorical exclusion, *with respect to existing structures*, should, however, be included in the Proposed Order, because the costs of that proposal truly do seem "de minimis," even absent proper notice and comment on them.
2. At a minimum, if the Commission should do more to explain how it arrived the structure of its proposed exclusion — especially regarding exclusion from review of new structures.

Any final order should also address two legal issues not addressed in the proposed Order:

- Traditional assessment of whether non-federal activity constitutes an "undertaking" subject to NHPA, or a "major Federal action" subject to NEPA, turns in part on the role of federal funding. 5G small cells, unlike Wi-Fi hotspots, may well involve federal funding from the Universal Service Fund. The Commission should address how such funding might affect whether small cells qualify for the categorical exclusion to avoid future uncertainty and, especially, litigation.

[23] Office of Management and Budget, Circular A-4, September 17, 2003, *available at* https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.

- Several states have proposed legislation that would regulate broadband services (to impose "net neutrality" requirements) as conditions of access to state-owned rights of way, as part of franchise agreements, etc. We believe such requirements have been lawfully preempted by the Restoring Internet Freedom Order, and will continue to be, regardless of whether small cells involve a "federal undertaking" under NHPA or a "major federal action" under NEPA, but the Commission should clearly explain why.

We appreciate the opportunity to comment on this matter.

Pursuant to the Commission's rules, please include this written *ex parte* and the attached documents in the docket for the above-referenced proceedings.

Sincerely,

/s/

Berin Szoka
President

/s/

Graham Owens
Legal Fellow